No. 17398

In the

United States Court of Appeals

For the Ninth Circuit

New York Life Insurance Company,
a corporation,
Appellant,
vs.
Joyce A. Harrington,
Appellee.

BRIEF FOR APPELLEE

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FILED

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEW YORK LIFE INSURANCE COMPANY, a corporation, Appellant,	
vs.	No. 17398
JOYCE A. HARRINGTON, Appellee.	

BRIEF FOR APPELLEE

This is an appeal from a judgment based upon Findings of Fact and Conclusions of Law made by the trial judge who heard the case without a jury. The Findings are amply supported by legally acceptable evidence and the judgment should be sustained.

It is Appellant's main contention that it was entitled to judgment as a matter of law because "Mr. Harrington voluntarily and needlessly performed an act so dangerous to human life that death followed as a foreseeable consequence." (Appellant's Brief, pp. 2, 19) This argument was made to the trial court and is answered by the trial judge in his memorandum opinion. We have

therefore included the opinion as Appendix A to this brief. In further answer, we have commented briefly on this subject in the argument section of this brief.

Appellant's other contention - that the judgment of the trial court is infirm because predicated, in part, upon inadmissible or nonexistent evidence, will be answered in the argument to follow.

JURISDICTION

Appellee adopts the statement of jurisdiction made by Appellant at page 2 of its brief.

STATEMENT OF THE CASE

The evidence was without substantial conflict. However, in their statement of the case counsel for Appellant omit certain evidence which, undoubtedly, played an important role in connection with the trial court's finding that Arnold Harrington's death "was not the result of suicide," (R. 20)* and that his death "resulted directly from accidental bodily injury." (R. 31-32) We therefore supplement Appellant's statement of the case with the following material.

Plaintiff was born in China and completed three years of

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*We have adopted Appellant's mode of reference to the printed record and exhibits. (See Appellee's Brief, footnote, p. 2)

college there. (R. 68) Arnold Harrington attended junior college in Iowa and continued his study of bacteriology and hematology during his service as a pharmacist mate in the United States Navy. (R. 69, 75-76)

Mr. and Mrs. Harrington were married in Shanghai on March 29, 1947. (R. 69) Eight days after their marriage they came together to San Francisco where Mr. Harrington was assigned to duty at the Navy Dispensary on Fell Street. (R. 69-70) In 1951 Mr. Harrington left the Navy and took civilian employment as a laboratory technician. (R. 70-72) About three years before his death he became chief laboratory technician at St. Luke's Hospital in San Francisco, a job in which he was "very interested." (R. 72-73, 76) Mr. Harrington was a "ham" radio operator and had considerable radio equipment in the house. (R. 76, 155) Mrs. Harrington shared this hobby with her husband and was also a licensed radio operator. (R. 76) Mr. Harrington had no serious health problems. (R. 174) At the time of his death he was earning approximately $1,200 a month and during 1960 the family finances had improved so that Mr. Harrington could indulge in the luxury of increasing his gun collection. (R. 77) He was not addicted to alcohol or drugs; never inflicted violence upon Mrs. Harrington; and did not leave a suicide note. (R. 128-129) Mrs. Harrington testified that she and Mr.

Harrington "loved each other very deeply and were happy." (R. 129) She knew of no reason why he would have wanted to take his own life. (R. 129)

On the evening of his death, Mr. Harrington was seated on the living room couch cleaning the most recent addition to his gun collection, a German Mauser semiautomatic hand gun. (R. 89, 177) He was drinking a highball, but was not intoxicated. (R. 89, 115, 145, Ex. 6, p. 8) (Mr. Harrington's alcohol blood level was 0.14 per cent. (R. 194)) The gun was equipped with a safety mechanism operated by a lever situated alongside and to the left of the hammer. (Ex. 1) With the hammer in the safe or forward position, although the hammer would fall upon release, a cam device prevented the hammer from contacting the firing pin. (R. 211-212) The hammer could be released from the cocked position and caused to fall to the firing position in three ways - (1) by trigger pressure, (2) by "fanning" or pulling the hammer back slightly from the cocked position and releasing it, and, (3) by moving the safety lever forward from the fire position to the safe position. (R. 103) Appellant's expert, Frank Chow, who sold the gun to Mr. Harrington on January 14, 1960, described the safety mechanism as "really a very safe safety." (R. 211) He said that he had explained to Mr. Harrington how the safety worked. (R. 210, 212) He also

said that it would be impossible for the gun to fire with the safety mechanism on safe (R. 210, 215-216) and that it was not unusual for owners of guns of this type to rely completely upon the safety mechanism. (R. 210)

The gun was examined by experts for both parties following the incident and before trial. No defect or malfunction was found. (R. 110, 221, 228) There was expert testimony that in drawing the hammer back to the cocked position with the thumbs of both hands, the safety lever could, inadvertently, be pulled from the safe position (R. 108) and that this could happen in cocking the gun with only one hand. (R. 110) Defendant's expert, Mr. Chow, testified as follows:

> "Q. (By Mr. Decker): Mr. Chow, assuming that this particular gun had been fully loaded and the handler of it had been producing this noise without discharging it (demonstrating), then it would be your opinion that the safety mechanism was on full safe?
>
> "A. Then it would have to be on full safe. Otherwise it would discharge.
>
> "Q. Right. Now, in your experience with the gun, what kind of an explanation could you give which would account for the gun being placed in the firing position, or, at least, in a position close enough to it so that it would fire, without the actor intending to do that? Do you understand my question?
>
> "A. Yes, I do. It's like anything else, a safety can be pushed off because you want to push

it off, manually, and it could be - under certain circumstances, it could be brushed off. There could be a lot of things could happen. That is, an accident is an accident.

"Q. You are referring now to the factor of human error involved?

"A. That's right, human error.

"The Court: What you are saying is that it could unintentionally be moved from a safe position to a firing position?

"The Witness: That's the only way the weapon would fire, is to move it, so if you move it, it has to be moved either intentionally or unintentionally, or accidentally, or whatever it is.

"Q. (By Mr. Decker): Could you illustrate how this might have been done unintentionally?

"A. Well, as you know, once you have taken it off the safe it moves rather smoothly, so that could be done in many ways. It could be caught in your clothes, a sleeve; it could be caught on - it could be caught on (inaudible). He could be cleaning it. There's lots of things that could cause it. That comes in the realm of "one of those things."

"Q. You wouldn't consider this to be an impossible thing to happen, would you sir?

"A. Nothing is impossible, sir.

"Q. I notice, among other things, that in cocking this gun, one has to pull the hammer back to this position.

"The Court: Would you do this where Mr. Murray can see you?

"Mr. Decker: I am not intentionally hiding it, your Honor.

"The Court. I know that.

"Q. (By Mr. Decker): I notice that in order to place a gun into a firing position, if there has been no prior discharge of the gun to automatically put it in that position, one has to pull the hammer back in this fashion, isn't that so?

"A. Yes, if it has not been cocked previously, yes.

"Q. In your opinion, would it be a reasonable possibility - a reasonable possibility -- that in doing that, the handler of the gun might inadvertently pull the safety mechanism back to the firing position?

"A. It is possible."

(R. 218-220)

While he was seated to her left on the living room couch, Mrs. Harrington heard Mr. Harrington producing a "clicking" noise comparable to the noise caused when, with the hammer in the cocked position and the safety lever in the safe position, the hammer is released and permitted to fall to the firing position. (R. 90) Mr. Harrington then arose and moved to a standing position in front of her across the coffee table which sat in front of the couch. (R. 91, 178-179) Mrs. Harrington testified she thought she heard more "clicking" noises while he was standing in front of her. (R. 91) She looked up and saw him standing before her with the gun in his right hand, and asked him not

to continue - that he was making her nervous. (R. 91-92) (Mrs. Harrington did not share her husband's interest in guns - she didn't like them (R. 79) and, according to her son, Arnold, Jr., "She said she did not want them laying around the house or anything like that. She said she did not want them loaded.") (Ex. 6, p. 6.) Mrs. Harrington then looked away. (R. 92, 184) Mr. Harrington continued clicking the gun "....because he knew it annoyed me" and she asked him a second time not to do it. (R. 94-95) His response was to say, "Don't worry, the safety is on - I will prove it to you." (R. 95) With this, she looked up to see him put the gun to his right temple. (R. 95, 116, 184-185) Immediately the gun discharged and he fell to the living room floor. (R. 118, Ex. A-1, R. 144) At the time the fatal incident occurred, Mr. Harrington was standing directly in front of his son, Arnold, Jr., who was seated facing the living room doing his homework. (Ex. 6, pp. 9-11; Exhibit 1 to the deposition of Mrs. Harrington)

Mrs. Harrington, when asked to describe Mr. Harrington's appearance as he fell, said, "I remember very markedly that he looked at me with great surprise on his face and he threw up his hands as he fell." (R. 118)

Mrs. Harrington gathered the children together in the

bedroom and called the police. (R. 86, 120-121) (Arnold, Jr., described by Officer Tognetti as a "very, very intelligent boy for that age," said that after the shot his mother called the police and, "I took hold of my sisters and brothers and the dog, and took them to the bedroom." (Ex. 6, p. 15)

According to Mrs. Harrington the first policeman to arrive, Officer Swinford, came within "ten minutes or so." (R. 121) Officer Swinford testified that at 10:32 P.M. he received a radio call from the office of the South San Francisco Police Department to his patrol car then located at Grant Avenue and Maple Street in South San Francisco. He proceeded immediately to the Harrington residence. This took "a maximum of five minutes." (R. 131) Upon his arrival, Mrs. Harrington was outside her home. He asked her what had happened. She replied "My husband just shot himself, but he didn't mean it." (R. 135)

The officers found the gun on the living room floor near the coffee table. The hammer was in the rear, or cocked, position. (R. 138, 149-150) The safety lever was in the rear, or fire, position. (R. 149) The experts agreed that this is the condition the gun would return to if, with a live round in the firing chamber, the magazine fully loaded, and the safety lever in the fire position, the gun was discharged by permitting the hammer

to fall from the cocked position. (R. 213-214, 236)

Officer Tognetti testified that there was no sign of a struggle and the house appeared to be well kept and neat (R. 154-155)

ARGUMENT

1. THE TRIAL JUDGE CORRECTLY DETERMINED THE FACTUAL ISSUE OF ACCIDENTAL DEATH

In his memorandum opinion, the trial judge recites his findings which negate suicide and lead to the conclusion that Arnold Harrington's death was the result of accidental bodily injury. The latter conclusion, he notes, follows from his findings that the gun had a reliable safety mechanism; that prior to discharge of the gun Mr. Harrington had been manipulating it and causing the hammer to fall toward the firing pin with the safety lever in a safe position without causing the gun to discharge; and that discharge of the gun was occasioned by inadvertent displacement of the safety lever from the safe position to the firing position just before he put the gun to his head. Thus, according to the trial judge's findings, the displacement of the safety lever was a mistake - something unexpected - which placed Mr. Harrington's death in the accidental category.

In asserting again on this appeal that the facts of this case leave no room for determination by the trier of fact that Mr. Harrington's death was accidental, Appellant relies on two lines of cases.

One line consists of decisions from other jurisdictions holding deaths resulting from such fate-tempting conduct as playing "Russian roulette," or handling poisonous snakes, to be non-accidental. These are the Allred, Kinavey, Ford, Baker, and Thompson cases cited and discussed at pages 21 through 25 of Appellant's brief. In these cases the voluntary conduct of the deceased was such that, viewed by the objective standard of the reasonable man, death was the foreseeable result.

The other line of cases relied upon by Appellant are those wherein appellate courts have held that deaths resulting from altercations involving gun play initiated by the insured to be non-accidental. This line of cases includes the Postler, Price and Eraldi cases cited and discussed by Appellant at pages 20 and 21 of said brief.

It is from the language of these authorities that Appellant has culled the rule,

> ". . . . when a man voluntarily and needlessly performs an act so dangerous to human life that death follows as a foreseeable consequence, death, when it occurs, is not accidental." (Appellant's Brief, p. 19)

Appellant's argument that this rule precludes recovery by Appellee herein is unsound and does not require lengthy answer.

The principal vice of this argument is simply that it ignores the trial court's finding that Arnold Harrington's voluntary act was not one so dangerous to human life that the reasonable man would consider death a foreseeable result thereof. Webster defines "voluntary" as follows:

> 1. Proceeding from the will, or from one's own choice or full consent; produced in or by an act of choice; as voluntary action. (Webster's International Dictionary, Second Revised Edition.)

It may reasonably be inferred from the evidence that the act which proceeded from Mr. Harrington's will or his own choice or full consent, was that of putting a loaded gun to his head which, because it was on safe and the safety mechanism was reliable and effective, would not discharge even though the hammer was released. Such a voluntary act was not one "so dangerous to human life that death follows as a foreseeable consequence."

In order for the trial court to determine the issues of suicide and accidental death, it was, of course, necessary to inquire into the insured's state of mind at the time he placed the gun to his head. But to inquire into decedent's state of mind was not, as contended by Appellant, to apply "the subjective standard of the state of mind of the insured" rather than the "objective

standard of forseeability to the reasonable man." (Appellant's Brief, p. 28) It is clear from a reading of the opinion of the trial judge that, in determining Mr. Harrington's death to be accidental, the court did not rely solely upon a finding that Mr. Harrington's state of mind was not one of anticipating that death would attend his action. The trial judge not only relied upon his finding that Mr. Harrington did not anticipate death but also upon his finding that such lack of anticipation was reasonable under all the circumstances. The trial judge applied the objective standard of foreseeability to the reasonable man. This is clearly indicated by the following quote from the opinion.

> "If, as expert testimony showed here, the gun had a safety mechanism which reasonably could be anticipated to prevent firing, and consequently death, when properly used, then it cannot be said that death was the foreseeable result of pointing the loaded gun if the one pointing the gun thought, and had good reason to believe, that the gun was in that condition." (R. 30)

Since Mr. Harrington's voluntary act was not one of initiating gun play as was the case in the California cases of Postler, Price and Eraldi, and since Mr. Harrington's voluntary act was not the fate-tempting type of conduct which invites foreseeable death such as that described in the extra-jurisdictional cases relied upon by Appellant, there can be no question

but what the trial court correctly applied the California authorities which hold death to be accidental when the events leading thereto contain a causal element which, it may be inferred from the evidence, was not foreseen or expected by the insured and which the insured reasonably could not be expected to have foreseen or expected.

Cox v. Prudential Insurance Company of America (1959) 172 C.A.2d 629, 636, 343 P.2d 99

Stokes v. Police and Firemen's Ins. Assn. (1952) 109 C.A.2d 928, 935, 243 P.2d 144

Also, having determined the nature of the decedent's voluntary act, the court correctly applied the well-established California rule that the death of an insured may be deemed accidental if caused by . . . "a casualty - something out of the usual course of events, and which happens suddenly and unexpectedly and without any design of the person injured."

Richards v. Travelers Insurance Co. (1891) 89 C. 170, 26 P. 762

Rock v. Travelers Insurance Co. (1916) 172 C. 462, 156 P. 1029

Losleben v. California State Life Insurance Co. (1933) 133 C.A. 550, 24 P.2d 825

Rooney v. Mutual Benefit Health and Accident Association (1946) 74 C.A.2d 885, 170 P. 2d 72

2. THE TRIAL COURT'S FINDING OF ACCIDENTAL DEATH RESTS UPON SUFFICIENT EVIDENCE

A. There Was No Erroneously Admitted Evidence

Rule 43(a) in the Federal Rules of Civil Procedure is not a rule of exclusion. Hence, the rule, whether federal or state, which favors reception in evidence governs. Rule 43(a) is to be liberally construed and doubtful cases should be resolved in favor of the admissibility of evidence.

Monarch Insurance Co. of Ohio v. Spach
(CCA 5, 1960) 281 F.2d 401

New York Life Insurance Co. v. Schlatter
(CCA 5, 1953) 203 F.2d 184

Mrs. Harrington testified that Mr. Harrington told her, before the gun discharged, that the gun was on safe and tried to show her this. Appellant contends this to be inadmissible hearsay. Decedent's statement that the gun was on safe was admissible to indicate, not whether the gun was, in fact, on safe or not, but to show that he thought that it was on safe. Such a statement on his part is highly relevant circumstantial evidence bearing on the factual issue of suicide. It is also highly relevant circumstantial evidence bearing upon the issue of accidental death. The declaration was admissible because it was not offered to prove the truth of the matter stated and therefore is not within the hearsay rule at all. (See 6 Wigmore, Sec. 1766)

In Witkin, California Evidence, the rule is stated as follows.

> "Frequently an utterance may justify an inference concerning a fact in issue, such as belief, intent, motive, etc., of the declarant, regardless of the truth or falsity of the utterance itself. It is admitted as circumstantial evidence of that independent fact. (See generally, McCormick, pp. 465, 567, 586; 6 Wigmore, 1715, 1790; Selected Writings, p. 763; 66 Harvard Law Review, 498, 501.)"
>
> Witkin, California Evidence, p. 243

And, in Whitlow v. Durst (1942) 20 C.2d 523, 127 P. 2d 530, Justice Traynor states the general rule as follows:

> "When intent is a material element of a disputed fact, declarations of a decedent made after as well as before an alleged act that indicate the intent with which he performed the act are admissible in evidence as an exception to the hearsay rule, and it is immaterial that such declarations are self-serving."

Counsel for Appellant strain to find inferences to support their conclusion that the declaration was made under suspicious circumstances. They argue, in effect, that the declaration is untrustworthy because Mr. Harrington intended to take his own life and, with brilliant foresight and knowledge of the law, staged an accident in order to protect his widow's right to double indemnity benefits!

But the evidence much more convincingly indicates that Mr. Harrington, intrigued by the unique safety mechanism of his new gun, and aware of his wife's fear thereof, was amusing himself and, at the same time, attempting to goad his wife into breaking her silence by releasing the hammer with the gun loaded but on safe. This caused the "clicking" noise which she heard. Then, he pursued her attention by standing before her and continuing this process. When she rose to the bait and remonstrated with him, he continued the game, intending to frighten her even more. And then the unexpected occurred. Perhaps the drink or two he had consumed, or the distraction created by his wife's response, caused the fatal slip. In any event, something went awry - the safety lever became displaced, and the gun discharged.

Viewing the evidence in this light, the circumstances are drained of suspicion and no error appears in the exercise by the trial judge of his discretion in admitting the declaration as a trustworthy item of evidence.

Another item of evidence which counsel contend was erroneously admitted was Mrs. Harrington's description of the appearance of her husband's facial appearance as follows: "He looked at me with great surprise on his face."

There was no error in the admission of this evidence. If the subject is one on which the ordinary person has some knowledge and experience, and the facts cannot be accurately or adequately stated, so that the witness can only testify to what he knows by giving an opinion, it may be admitted. (Healey v. Visalia & T. R. Co. (1894) 101 C. 585, 36 P. 125) Moreover, the opinions of non-expert witnesses are admitted as a matter of practical necessity when the matters which they have observed are too complex or too subtle to enable them accurately to convey them to court or jury in any other manner. (Manney v. Housing Authority (1947) 79 C.A. 2d 454, 180 P.2d 69) The situation is analogous to that in Peo. v. Beacon (1953) 117 C.A.2d 206, 255 P.2d 98 wherein a witness testified to the "spirit or tenor of voices" that he heard in a room directly above his own. He stated that the voices denoted "anger." The court held that this was proper, stating -

> "Anger, like speed or sobriety, must be described as a conclusion... How 'anger' could be evidenced by other than characterizing it as such is difficult to see. Anger is the fact, not the voices that evidenced the anger. Every attempt at analyzing the voices heard would reproduce the same objection here made, if it were a good one."

Finally, Appellant asserts that Officer Swinford should

not have been permitted to testify that when he arrived at the Harrington home moments after the incident, Mrs. Harrington told him, "My husband just shot himself, but he didn't mean it."

It may reasonably be inferred from the evidence that this assertion was made within six minutes from the time Mrs. Harrington had seen her husband drop to the floor having just met his death in a manner which could only have been an unexpected and tremendously shocking and frightening experience for her. All of the conditions requisite to invocation of the "spontaneous exclamation" exception to the hearsay rule (startling event, statement during excitement and statement related to event) could reasonably have been found to be present. (See Witkin, California Evidence, pp. 297-298.)

Moreover, the rule is that the determination as to whether the requisite conditions for admissibility as a spontaneous exclamation are present is for the discretion of the trial judge; the trial judge is better equipped to pass upon admissibility than the appellate court. (Dolberg v. Pacific Electric Railway Co. (1954) 126 C.A.2d 487, 272 P.2d 527)

With respect to Appellant's contention that the phrase "...but he didn't mean it" constitutes inadmissible opinion evidence, we deem it a sufficient answer to point out that counsel

for Appellant have cited no California authority for the proposition that the court should apply the exclusionary opinion rule to evidence admitted under the spontaneous exclamation exception to the hearsay rule. There is conflict elsewhere on this point but the better view seems to be that the opinion rule should not be applied in this situation. See McCormick, p. 583; 1955 Survey of American Law, 629; 1957 Survey of American Law, 548; 163 A.L.R. 186; 53 A.L.R. 2d 1287.

B. Any Error Which The Trial Judge May Have Made in The Admission of Evidence was Harmless.

Rule 61, Federal Rules of Civil Procedure, provides, in part, as follows:

> "No error in either the admission or exclusion of evidence* * *is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not effect the substantial rights of the parties."

Where evidence erroneously admitted is merely cumulative of other evidence which, alone, suffices to support the determination of the trial court, such error is harmless under the above rule. (Eckis v. Graves Tank and Manufacturing Co., (CCA

9, 1951) 289 F. 2d 335) In this case, the determination of accidental death rests upon much evidence other than that which Appellant contends was admitted erroneously. Accidental death could reasonably have been inferred from the evidence negating suicide and the evidence of the characteristics of the gun and decedent's manipulation of same. In New York Life Insurance Co. v. Dick, (1958) 359 U.S. 437, 79 S. Ct. 921, the insured died from injury inflicted by discharge of a shotgun. There were no witnesses to the fatal incident. The only evidence to support the jury's determination that death was accidental was certain evidence negating suicide as an explanation and testimony that the gun in question was unreliable. The Supreme Court held this evidence sufficient to support the verdict in plaintiff's favor, reversed the Circuit Court of Appeals, and reinstated the judgment of the trial court.

We submit that, disregarding the evidence which Appellant contends was erroneously admitted, there is more than sufficient evidence in the record to support the trial judge's finding of accidental death.

CONCLUSION

The tendency of courts today, including those of California is to regard "accident" as Mr. Justice Cardozo characterized it in a dissenting opinion. He said, with reference to the tortured reasoning by which courts had purported to distinguish between deaths resulting from "accidental means" and those resulting from mere "accident, -

> "The attempted distinction between accidental results and accidental means will plunge this branch of the law into a Serbonian Bog. Probably it is true to say that in the strictest sense and dealing with the region of physical nature, there is no such thing as an accident. * * * On the other hand, the average man is convinced that there is, and so certainly is the man who takes out a policy of accident insurance. It is his reading of the policy that is to be accepted as our guide, with the help of the established rule that ambiguities are to be resolved against the company. * * * When a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means. * * * If there was no accident in the means, there was none in the result, for the two were inseparable. * * * There was an accident throughout, or there was no accident at all."
>
> (Dissenting opinion in Landress v. Phoenix Mut. L. Ins. Co. (1934) 291 U. S. 491, 54 S. Ct. 461, quoted with approval in Cox v. Prudential Ins. Co. (1959) 172 C. A. 2d 629, 637-8, 343 P. 2d 99.)

California courts have never abandoned the distinction. (Zuckerman v. Underwriters at Lloyds (1954) 42 C. 2d 460, 476-7, 267 P. 2d 777, 784) Thus, it is certainly argueable that, because recovery of double indemnity in this case does not depend upon proof of death by "accidental means", plaintiff's burden was only

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> [illegible]

[illegible]

to establish that the insured did not anticipate that death would be the result of his act. There is considerable California authority to support the proposition that, in a case where the benefit is payable upon proof of mere accident the test is the purely subjective one of anticipation by the insured. (Rock v. Travelers Ins. Co. (1916) 172 C. 462, 465, 156 P. 1029, 1030; Olinsky v. Railway Mail Ass'n. (1920) 182 C. 669, 672, 189 P. 835, Davilla v. Liberty Life Ins. Co. (1931) 114 C. A. 308, 299 P. 831, 833, Losleben v. California State Life Ins. Co. (1933) 133 C. A. 550, 24 P. 2d 825; Dark v. Prudential Ins. Co. (1935) 4 C. A. 2d 338, 40 P. 2d 906 908; Zuckerman v. Underwriters at Lloyds (1954) 42 C. 2d 460, 476-7, 267 P. 2d 777, 784)

We submit that whether the test is the purely subjective one, or that of foreseeability to a reasonable man, the evidence in the case at bar is more than sufficient to support the finding of accidental death. Justice Cardozo's observation - that an occurrence is accidental if the average man would characterize is as such - is pertinent here because it provides an approach which is helpful in guiding us through the "semantic and polemical maze" (166 A. L. R. 469, 477) created by the decisions in this area and relied on by Appellant.

The evidence in this case most certainly is such that the average man, considering same, could reasonably conclude that Mr. Harrington's death was an accident and characterize it with

[illegible]

[illegible]

[illegible]

that term.

We conclude that for this reason, and for all the other reasons stated above, the judgment below should be affirmed.

Dated: October 30, 1961

Respectfully submitted

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Attorneys for Appellee

(Appendix Follows)

MEMORANDUM FOR JUDGMENT

This is an action for double indemnity benefits in the amount of $15,000 under two policies of insurance issued by the defendant, New York Life Insurance Company, to Arnold Harrington, the deceased, as insured. The single indemnity life insurance benefits under the policies have already been paid to Mr. Harrington's widow and the beneficiary, Joyce A. Harrington, the plaintiff in this action, and there is no dispute concerning those benefits.

Mr. Harrington was fatally injured by a self-inflicted gunshot wound on February 5, 1960, and died the same day. This action was commenced on August 17, 1960, by the filing of a complaint in the Superior Court of the State of California, in and for the City and County of San Francisco. On August 29, 1960, the action was removed to this Court by defendant pursuant to the provisions of 28 U.S.C. Sec. 1441(a). This Court has jurisdiction of the action under the provisions of 28 U.S.C. Sec. 1332.

The sole issue in the case is whether the death of Arnold Harrington "resulted directly, and independently of all other causes, from accidental bodily injury * * *" within the

meaning of the double indemnity provisions of the policies. The plaintiff submitted appropriate proof of death in which plaintiff represented the cause of death to be "accidental shooting." In its answer defendant has declined to pay the double indemnity benefits. There is also lurking in the record under this defense (though not vigorously made) the suggestion by the defendant that the death was the result of suicide and therefore excluded under the double indemnity provisions of the policies. The parties agree that this case is controlled by the California law on the subject, since the contracts of insurance were issued in California, and the incident, which is the subject of this suit, occurred in California.

The facts, which are practically undisputed, are as follows:

Mr. Harrington, the insured, was a laboratory technician by occupation and was thirty-eight years old. He was married to the plaintiff herein, and as the issue of that marriage there were five children living in the home, the eldest being age eleven. He was happy in his occupation, which at the time of his death was bringing him an income from $1,000 to $1,200 per month. His financial condition was relatively good, in that other than secured obligations for payments

on his home and automobile, and current living expenses, all of which were currently in good standing, he had no financial obligations. His health and the health of his family were good, with the exception that he had an ulcer which was in a controlled condition. His family relationship appeared to be a happy one. There is no history of suicidal threats or tendencies. He had a hobby of collecting guns. Mrs. Harrington was fearful of guns, and did not participate in her husband's hobby. At the time of his death he was the owner of a number of rifles and hand guns of various types, among them the German Mauser semi-automatic pistol with which he fired the fatal shot. Mr. Harrington fired his guns frequently at a firing range, was quite familiar with them, was an expert shot, and prided himself upon his knowledge of guns. On the day of his death Mr. Harrington had been home from work with an adverse reaction to a flu shot, and he had a minor quarrel with his wife concerning her overstaying a visit with a girlfriend. Mr. Harrington had been drinking, but did not appear to be intoxicated. The quarrel continued and Mr. Harrington left the house in anger, returning approximately an hour later. Upon his return Mrs. Harrington refused to make up with her husband or to reply to him. At that time present in the room was the oldest child, a

son aged eleven. Mr. Harrington, saying words to the effect that he might as well do something he enjoyed, started handling the Mauser semi-automatic pistol. The pistol was loaded with one shell in the barrel, or firing chamber, and eight or nine shells in the magazine. He was causing the gun to make a clicking noise. According to the evidence this could have been done in one of three ways, all of which involved causing the hammer to be released from a cocked or semi-cocked position to firing position, while the safety lever was on safe. The safety mechanism on the gun was so designed that even though the hammer dropped toward the firing pin it would not strike the firing pin while the safety lever was in the safe position. After a number of clicks Mrs. Harrington requested him to stop, saying in substance "Please don't do that, you know it makes me nervous" or "you know it's dangerous," to which Mr. Harrington replied that the gun was safe, and "see, I'll show you." Whereupon he placed the gun to his head and the gun fired, causing the gun shot wound through his head which caused his death shortly thereafter.

There was expert testimony concerning the condition of the gun and the operation of its mechanism. The significant factors are that there was little, if any, probability that

the gun would fire when the safety lever was in the position of safe, one witness saying the chances were a million to one, and that this was so regardless of how the hammer was released; that the only way the gun could be fired was when the safety lever was in a fire position; that as a matter of general safety practice with respect to firearms it was "dangerous" to point a firearm loaded, or unloaded, with the safety on, or off, at any vital part of the body. Under these circumstances the Court finds:

(1) That the death was produced by a gun shot wound, which was caused by the voluntary act of the deceased;

(2) That deceased knew the gun was loaded, but he thought the safety lever was in a safe position and that the gun would not fire in that condition, and, further, that the gun could be pointed at his head safely in the condition;

(3) That at the time of the firing the safety lever of the gun was in the fire position, but that this condition was unknown to and unexpected by the deceased; and

(4) That the deceased had no intention to take his own life.

Under these facts plaintiff contends that death occurred from "accidental bodily injury," and defendant

contends that as a matter of law death could not have so occurred because the act of pointing a loaded gun at his head by the deceased was either suicidal or so inherently dangerous that death followed as a foreseeable consequence.

While defendant suggests that the conduct of the deceased might have been suicidal, the main thrust of its argument is based upon the proposition that the death was non-accidental because of the performance of a dangerous act from which death was a foreseeable consequence. Defendant's reluctance to strongly urge that the death was the result of a suicidal act is confirmed by the evidence. Other than the minor family quarrel which occurred on the day of the shooting, there was no factor in Mr. Harrington's life which either directly or indirectly supports the inference that he intended to take his own life at the time of the shooting, or at any other time. Such factors as his condition of health, his financial status, his family status, and his mental condition, are all negative on the question of suicidal intent. The act of pointing a loaded gun, which he thought was safe, at his head, which might be characterized as foolish or dangerous, under the circumstances in which it occurred in this case is not suicidal. Plaintiff, therefore, has carried the burden that the

death was not the result of suicide.[1] See Wilkinson vs. Standard Acc. Ins. Co., 180 C. 252; Canada Life Assurance Co. vs. Houston, Cir. 9, 1957, 241 F. 2d 523.

The other portion of the defendant's contention raises a more difficult question, namely, whether under the circumstances of this case the non-suicidal death was caused by accidental bodily injury. In this situation it is the duty of this Court to determine what the courts of last resort of the State of California would hold under the facts of this case. In Young vs. Aeroil Products Co., Cir. 9, 1957, 248 F. 2d 185, the court said at page 188:

"Preliminarily, it should be noted that the law of California governs the substantive issues in this case. It was in that state that the machine was purchased and used and where the fatal accident occurred. It is our limited duty to discern the substantive law of California on the issues in controversy and to apply it accordingly. Our task is not to innovate, but to imitate. Where the course of the law remains

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[1] In its brief defendant asserts that the burden of showing that death was not the result of suicide was on the plaintiff, citing Zuckerman vs. Underwriters at Lloyd's, 42 C. 2d 460 (1954). If defendant's assertion is the holding of the Zuckerman case plaintiff here has met that burden. It is unnecessary for this Court to determine whether or not the Zuckerman case so holds.

"uncharted, as is the situation with several of the issues in the instant case, it is the duty of the Federal court to examine germane precedents and analogous decisions in California and to endeavor to ascertain from those decisions how the California courts would decide the case at bar. In the absence of direct authority, we must heed such guideposts as the state courts have constructed, for even here true allegiance to principle of Erie Railroad Co. vs. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L. Ed. 1188 precludes unrestrained and independent determination in a diversity case."

There are a number of California cases dealing with the interpretation of insurance policies which provide for death payments as the result of accidental deaths. Careful research by counsel and by the Court fails to disclose any California case which closely resembles this case on its facts and it would be difficult to say with certainty what the California courts would hold under these circumstances. The California cases seem to make a distinction between insurance policies which insure against accidental death, and a death caused by accidental means, holding that those policies which insure against death from accidental means require proof not only "that death or injury should be unexpected or unforeseen,

"but there must be some element of unexpectedness in the preceding act or occurrence which leads to injury or death." Rock vs. Travelers' Ins. Co. 172 C. 462.

There is a suggestion in later California cases that this distinction no longer is valid. Cox vs. Prudential Ins. Co., 172 C.A. 2d 629, 637. See also: Zuckerman vs. Underwriters at Lloyd's, 42 C. 2d 460, 473. In any event the distinction is of no moment in this case, because the policy in this case insured against death from accidental bodily injury, and would fall in the "accidental results" type of case as distinguished from the "accidental means" type of case, the latter requiring a greater quantum of proof. It is the conclusion of this Court that the proof in this case is sufficient to establish that death resulted from accidental bodily injury under either standard.

This conclusion is based upon the definition of "accidental" as that term is used in accident insurance policies. The earliest California case dealing with the definition of this word in the context of insurance cases is Richards vs. Travelers Ins. Co., 89 C. 170, where the court said:

"It is impossible to give a precise definition of the word 'accidental.' As every effect has a cause, there is one sense in which nothing is accidental.

"Accident policies are of recent origin, and there have been only a few judicial decisions with respect to them. But the authorities to be found on the subject seem to be to the point that 'accident' must be given its popular meaning; that is, a casualty - something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person injured. The fullest discussion of the subject is to be found in the opinion of the United States circuit court for the district of Michigan, in the case of Ripley vs. Railway Company, 2 Bigelow's Life & Acc. Ins. Cas. 738. In that case the insured had been attacked by highwaymen intended violence, there was no accident. The learned judge (Withey, J.), in delivering the opinion of the court, says: 'Perhaps, in a strict sense, any event which is brought about by design of any person is not an accident, because that which has accomplished the intention and design, and is expected, is a foreseen and foreknown result, and therefore not strictly accident. Yet I am persuaded this contract should not be interpreted so as thus to limit its meaning; for the event took place unexpectedly, and without design on Ripley's part. It was to him a casualty, and in the more popular and common acceptation, "accident," if not in

"' its precise meaning, includes any event which takes place without the foresight or expectation of the person acted upon or affected by the event * * * I think in construing a policy of insurance against accident, issued to all sorts of people, a majority of whom do not, as the company well knew, nicely weigh the meaning of words and terms used in it, courts are called upon to interpret the contract as a large class not versed in lexicology are sure to regard its terms and scope. That which occurs to them unexpectedly is by them called accident. The company fix the terms of the contract and are to be held, in the absence of plain unequivocal exceptions and provisions, to intend what, in popular acceptation, the insured party is likely to understand by its terms.' In that case judgment went for defendant upon another point, and was affirmed by the United States supreme court, where the meaning of 'accident' was not discussed (16 Wall. 336); but the language of Judge Withey seems to us to express correct views of the question." (89 C. 175-176.)

This definition, "a casualty - something out of the usual course of events, and which happens suddenly and unexpectedly, and without any design on the part of the person insured," has been repeated often in the many California cases

which have subsequently dealt with the problem. Some of these cases are Price vs. Occidental Life Ins. Co., 169 C. 800, 802; Rock vs. Traveler's Insurance Co., supra; Rooney vs. Mutual Benefit H. & S. Ass'n., 74 C.A. 2d 885, 888; Zuckerman vs. Underwriters at Lloyd's, supra; and Cox vs. Prudential Ins. Co., supra. The essence of defendant's position is that the deceased invited death by engaging in conduct so inherently dangerous that death was the foreseeable result. In support of its position defendant cites Postler vs. Traveler's Ins. Co., 173 C. 1, overruled on other grounds in Zuckerman, supra, Price vs. Occidental Life Ins. Co., supra, and Eraldi vs. No. Am. Acc. Ins. Co. (N.D. Cal. 1937), 20 F. Supp. 735. In all of these cases the deceased started an altercation, which resulted in the death of the deceased caused by a shot from a gun fired by the other person to the altercation. In each of these cases the court held that in a case where the deceased invited death from a deadly weapon in the hands of another person the killing was a natural and probable consequence of his own voluntary act, and not an accident. In Postler, supra, the court said:

"The appellant contends, and we think upon good ground, that under any reasonable view of the evidence, the

"injuries suffered by Postler were not produced by accidental means, but were the natural and probable consequence of his own voluntary acts. In Western Commercial Travelers' Assn. vs. Smith (85 Fed. 401, 405, (40 L.R.A. 653, 29 C.C.A. 223)), the court said that 'an effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of the means which produced it * * *' (See also, 4 Cooley's Briefs on Insurance, p. 356; Fidelity etc., Co., vs. Stacey's Exrs., 143 Fed. 271, (6 Ann. Cas. 955, 5 L. R. A. (N.S.) 657, 74 C.C.A. 409); Price vs. Occidental Ins. Co., 169 Cal. 800, (147 Pac. 1175); Rock vs. Travelers' Ins. Co., 172 Cal. 462 (156 Pac. 1029); Hutton vs. State Accident Co., 267 Ill. 267 (Ann. Cas. 1916C, 577, L.R.A. 1915E, 127, 108 N.E. 296); Prudential Casualty Co. vs. Curry, 10 Ala. App. 642 (65 South. 852).) In Price vs. Occidental Life Ins. Co., we had occasion to deal with a situation somewhat similar to the one before us. The insured had been killed by the discharge of a revolver held in the hands of another person. It was held that 'if it should appear that the killing had been the result of

"'an encounter with deadly weapons, and that the deceased had himself invited and brought on such conflict, the fatal result would not have been accidental so far as he was concerned.' The decision of the United States circuit court of appeals in Taliaferro vs. Travelers' Protective Assn. of America (80 Fed. 368 (25 C.C.A. 494)), was cited with approval. There the court upheld a directed verdict in favor of the insurance company, it appearing that the insured had invited another to a deadly encounter which had resulted in his killing. Under the undisputed facts, we do not see how the case at bar can be taken out of the principle of those just referred to. Postler, after arming himself and declaring his intention of getting back his money, had gone to the gambling house and had there undertaken to compel the payment of one thousand dollars at the point of a pistol. While he was engaged in this effort, an encounter took place between him and one of the men who was in the place when he arrived. In the course of this encounter he was killed.

"A man who attempts to obtain money from others by the display of a deadly weapon, aiding such display by threats of killing, must contemplate, as the natural and probable consequence of his actions, that there will be resis-

"tance to or interference with the consummation of his plan, and that such resistance or interference will be likely to result in armed conflict and serious injury to one or more of the participants. To all intents and purposes, Postler's position, so far as concerns the probable consequences of his acts, was that of any man who attempts robbery at the point of a firearm. If such a man were killed by his intended victim, it could hardly be claimed that his death was caused by 'accidental means,' in the sense in which those words are used in policies like the ones before us. We are not suggesting that, from an ethical standpoint, Postler's action was to be judged by the standards which would be applied to the commission of an ordinary robbery. The conditions under which he had lost his money in gambling may have been such as to make him feel, whether rightly or wrongly, that he was justified in resorting to extreme and lawless measures in the effort to recoup his losses. But these considerations do not affect the ultimate question, which is whether the killing was the natural and probable consequence of his own voluntary acts. Under the authorities above cited, this question must be answered in the affirmative." (173 C. 4-5)

Plaintiff's position is that death in this case was

accidental because it was the unexpected and unforeseeable result of a voluntary act, and plaintiff urges that, although the deceased's voluntary act of pointing a loaded gun at his head was both dangerous and unnecessary, death was the result of the deceased's mistaken belief that the safety lever of the gun was in a safe position, and that, therefore, the gun would not fire.

In support of her position plaintiff cites a number of cases, among which are Cox vs. Prudential Ins. Co., supra, and Rooney vs. Mutual Benefit H. & S. Ass'n, supra. In both of these cases the deceased had placed himself in a position of peril by a voluntary act of his own. In Cox, supra, the deceased had deliberately and voluntarily jumped out of a moving vehicle in which he was being transported as a prisoner by law enforcement officers, and was killed by a following vehicle. In Rooney, supra, the deceased started a fist fight, and was knocked to the ground and killed by striking his head against the sidewalk. Both of these cases are subsequent in time to the California cases cited by the defendant. Both quote from the case of Losleben vs. Cal. State L. Ins. Co., 133 C.A. 550, 556, with approval:

"While an injury to an insured person may result in

"greater or less degree from an original voluntary act upon his part, if there is some evidence which justifies the inference that the means which produced the injury contained something of an unexpected or unforeseen character involving other acts not intentionally done, the resulting injury may be said to be caused through accidental means." (133 C.A. 556.)

In Rooney, supra, it is said:

"The rule in California is that each case must stand upon its own facts and that the legal principles enunciated as to what constitutes 'accidental means' as distinguished from 'accidental result' must be applied to such facts as appear in the particular case. These principles, applied to the facts of this case, do not support appellant's claim that when one invites a fistic encounter and sustains injury or death therefrom recovery cannot in any case be had upon policies of the character here involved. To prevent a recovery upon such a policy, it must be made to appear that in utilizing the means to which he resorted the insured knew or should have known that he would probably sustain the injury which resulted as a consequence thereof." (74 C.A. 2d 890.)

These more recent California cases seem to teach that, even though death may be the result of a voluntary act of

the deceased in which the deceased started in motion a perilous course of conduct, death may be accidental where there is some act or occurrence in the course of conduct which is unanticipated and unexpected by the deceased, and from which it cannot be said reasonably that death was the natural or probable consequences of such conduct. The cases are not clear on where reasonable foreseeability ends and the unexpected begins, but seem to leave that question to the facts of each case.

Here the facts would seem to support the conclusion of accidental death rather than death as the foreseeable result of a dangerous or perilous course of conduct. It does not require expert opinion to establish that it is dangerous or perilous to point a loaded gun at one's head in the parlance of general safety practices in the handling of firearms. However, this does not mean that every death which results from the performance of such conduct is not an accident. If, as expert testimony showed here, the gun had a safety mechanism which reasonably could be anticipated to prevent firing, and consequently death, when properly used, then it cannot be said that death was the foreseeable result of pointing the loaded gun if the one pointing the gun thought, and had good reason to believe, that the gun was in that condition. The conduct of the deceased

here could be called foolish, stupid, dangerous, perilous, unnecessary and many other characterizations of a similar import, but in the context of the surrounding circumstances it would require a strained appraisal of the facts to say that what occurred was not unexpected and unforeseen by him. Before he pointed the gun at his head he had been doing the same unsafe, mechanical manipulation with the gun by causing the hammer to be released toward the firing pin with the safety lever in a safe position without firing the gun. His announced purpose for putting the gun to his head was to demonstrate the safety of the gun in that condition. It was his mistaken belief that the gun was safe which produced the unexpected occurrence. It can be argued with some degree of plausibility that the deceased should have foreseen what probably happened here, namely, that somehow, in the manipulation of the gun he inadvertently moved the safety lever from a safe position to a fire position just before putting the gun to his head. In other words, should he have anticipated the mistake which caused his death? The answer is that in the common understanding an occurrence which happens as the result of a mistake is usually an accident. When weighing probabilities in this area the courts seem to require some element of certainty of the end result by the means used,

without the intervention of some act or occurrence of an unexpected nature, such as a mistake, before holding that death is a foreseeable consequence. Here the end result of death would not have occurred but for the mistaken and unexpected condition of the gun. The Court, therefore, concludes that death in this case resulted directly from accidental bodily injury.

Defendant has cited a number of cases from jurisdictions other than California which are not supported by the weight of authority in California, or are distinguishable on their facts. These cases are Kinavey vs. Prudential Ins. Co. of Am., Pa. 1942, 27 Atl. 2d 286 (doing acrobatic stunts on the rail of a bridge while intoxicated); Allred vs. Prudential Ins. Co. of Am., N.C. 1957, 100 S.E. 2d 226 (a fourteen year old boy killed as the result of laying down in the middle of a highway to show how brave he was); Ford vs. Standard Life Ins. Co., Tenn. 1947, 12 C.C.H. Life, Health and Accident Cases 789 (handling a venomous snake under the religious belief he could handle such snakes without harm); Thompson vs. Prudential Ins. Co. of Am., Ga. App. 1951, 66 S.E. 2d 119 (playing a form of "Russian roulette"); and Baker vs. National Life & Acc. Ins. Co., Tenn. 1956, 298 S.W. 2d 715 (permitting a person to shoot at a can on the insured's head). There

should be added to the cited cases Trivette vs. New York Life Ins. Co., Cir. 6, 1960, 283 F. 2d 441 (shooting self with pistol). What was said in Cox, supra, seems apropos here:

> "Appellant cites several other cases in support of its contention that the death was not caused by accidental means. Those cases are factually distinguishable from the present case. It may be stated generally that in those cases the death was the direct result of the voluntary act of the insured (such as jumping from a high building or the top of a moving train) and no act of an intervening agency was involved; or that the death resulted from performing a daredevil stunt (such as handling a rattle snake, playing Russian Roulette, or permitting a person to shoot at a can on the insured's head); or that the death resulted from fighting with guns." (172 C.A. 2d 638.)

There are outside cases which seem to support plaintiff. See: Aetna Life Ins. Co. vs. Kent, Cir. 6, 1934, 83 F. 2d 685; and Peppers vs. Sovereign Camp, W.O.W., Ga. App. 1936, 187 S.E. 215.

During the course of trial defendant objected to and moved to strike certain pre-death conversations by deceased and statements by plaintiff made shortly after the occurrence. The Court admitted the evidence and reserved ruling on the

objections and motions to strike. The objections are overruled, and the motions denied. At the conclusion of the plaintiff's case defendant moved to dismiss on the ground that the evidence, as a matter of law, did not establish that death occurred from accidental bodily injury within the meaning of the two insurance policies in question. Ruling was reserved. The motion to dismiss is denied.

Prior to the taking of evidence plaintiff requested the right to amend the pleadings to conform to proof on the question of interest. Plaintiff should forthwith present her proposed amendment, so that final judgment can be prepared and entered after the question of interest is determined.

Judgment is awarded plaintiff in the amount claimed, subject to the determination of the question of interest. Under the provisions of Rule 52(a) F.R.C.P. the findings and conclusions in this memorandum shall constitute the findings of fact and conclusions of law of the Court, except on the issue of interest, and counsel for plaintiff is directed to prepare and present a judgment in accordance herewith after the determination of the question of interest.

Dated: March 31, 1961.

/s/ OLIVER J. CARTER,
United States District Judge

(Endorsed): Filed March 31, 1960.